Supreme Court, U.S.
FILED
NOV 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

# 87-935

NO. 87-

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

STATE OF ALABAMA,

PETITIONER - APPELLEE

VS.

KENNETH JOSEPH FORTIER, JR.,

RESPONDENT - APPELLANT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
OF ALABAMA

## BRIEF AND ARGUMENT IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT AND TO THE ALABAMA COURT OF CRIMINAL APPEALS

DON SIEGELMAN
ATTORNEY GENERAL

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General
The Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

BEST AVAILABLE COPY

## QUESTIONS PRESENTED

I.

DOES THE STATE HAVE TO MAKE A SHOWING OF "ABSOLUTE CERTAINTY" THAT THE EVIDENCE WOULD HAVE BEEN DISCOVERED ABSENT AN ILLEGAL ACT BEFORE A COURT CAN ADMIT THE EVIDENCE PURSUANT TO THE INEVITABLE DISCOVERY EXCEPTION TO THE EXCLUSIONARY RULE?

II.

(A)

IS IT "SPECULATIVE" WITHIN THE MEANING OF NIX V. WILLIAMS, 467 U.S. 431 (1984) TO ASSUME THAT POLICE OFFICERS WITH PROBABLE CAUSE TO OBTAIN A SEARCH WARRANT TO SEARCH A HOME WOULD HAVE OBTAINED THE WARRANT HAD THE DEFENDANT NOT CONSENTED TO THE SEARCH?

(B)

IS IT "SPECULATIVE" WITHIN THE MEANING OF NIX, SUPRA, TO ASSUME THAT TRAINED POLICE OFFICERS WOULD HAVE FOUND THE ROBBERY WEAPON, WHICH WAS LOCATED IN AN OBVIOUS PLACE, WITHOUT THE DEFENDANT'S ASSISTANCE?

## PARTIES

In the Circuit Court of Tuscaloosa County, Alabama, and in the Supreme Court of Alabama, the party was Kenneth Joseph Fortier, Jr. as Defendant and Respondent, respectively, he being the Respondent herein, and the State of Alabama, as Plaintiff and Petitioner, respectively, said State being Petitioner herein. In the Court of Criminal Appeals, the parties were and are the same defendant as Appellant and the same State of Alabama, as Appellee.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED..... | I |
| THE PARTIES..... | II |
| TABLE OF CONSTITUTIONAL PROVISIONS..... | ii |
| TABLE OF CASES..... | ii |
| TABLE OF STATUTES..... | iii |
| OPINIONS BELOW..... | 1 |
| JURISDICTION..... | 1 |
| CONSTITUTIONAL PROVISIONS INVOLVED..... | 1 |
| STATUTORY PROVISIONS..... | 2 |
| STATEMENT OF THE CASE..... | 3 |
| STATEMENT OF THE FACTS..... | 4 |
| SUMMARY OF THE ARGUMENT..... | 13 |
| ARGUMENT..... | 14 |
| CONCLUSION..... | 25 |
| CERTIFICATE OF SERVICE..... | 27 |

## TABLE OF CONSTITUTIONAL PROVISIONS


| | PAGE |
|---|---|
| Constitution of the United States 1799 | |
| Amendment Four..... | 1 |
| Amendment Five..... | 1 |


## TABLE OF CASES


| | PAGE |
|---|---|
| Gissendanner v. Wainwright, 482 F.2d 1293 (5th Cir. 1973)..... | 23 |
| People v. Payton, 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224 (1978)..... | 17 |
| United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980)..... | 15, 23 |
| United States v. Cherry, 759 F.2d 1196 (5th Cir. 1984)..... | 14 |

## TABLE OF CASES (CONTINUED)


PAGE

United States v. Roper,
681 F.2d 1354
(11th Cir. 1982)..... 16

United States v. Satterfield,
743 F.2d 827
(11th Cir. 1984)..... 16


## TABLE OF STATUTES


PAGE

Code of Alabama, 1975

§13A-8-41..... 2

## OPINIONS BELOW

The decision and opinion of the Alabama Appellate Court, when reported, will be reported as follows:

Fortier v. State, ___ So.2d ___ (Ala. Cr. App. 1987)

A copy of the same is also appended to the petition as Appendix "A".

## JURISDICTION

Petitioner seeks review pursuant to this Honorable Court's jurisdiction under 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's claims involve the Fourth and Fifth Amendments.

## STATUTORY PROVISIONS

Respondent was convicted of two counts of Robbery under §13A-8-41, Code of Alabama, 1975.[1]

---

[1] §13A-8-41. Robbery in the first degree.

(a) A person commits the crime of robbery in the first degree if he violates section 13A-8-43 and he:

(1) Is armed with a deadly weapon or dangerous instrument; or

(2) Causes serious physical injury to another.

(b) Possession then and there of an article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon or dangerous instrument, or any verbal or other representation by the defendant that he is then and there so armed, is prima facie evidence under subsection (a) of this section that he was so armed.

(c) Robbery in the first degree is a Class A felony. (Acts 1977, No. 607, p. 812, §3305.)

## STATEMENT OF THE CASE

Defendant was indicted by the July, 1984 Term of the Tuscaloosa County Grand Jury for robbery in the first degree. His case came for trial on October 30, 1984, and he was found guilty as charged in the indictment. After a pre-sentence investigation, the defendant was sentenced to life imprisonment without parole.

On April 28, 1987, the Alabama Court of Criminal Appeals reversed the conviction on the ground that his conviction had been obtained in violation of his Fifth Amendment right to counsel. The Court denied the State's petition for rehearing and the State's petition for certiorari to the Alabama Supreme Court was denied on September 25, 1987.

## STATEMENT OF THE FACTS

In the early morning hours of July 22, 1984, three University of Alabama students, Jagjett Sidhue, Rajseh Khedekar, and Sandeep Sharma, were leaving a local campus nightclub called the Zoo. They were approached by a young white female, identified as Tammy Gamso, who began talking to them and who also stated that she was waiting for two male friends. Shortly thereafter, two black males approached, one holding a gun, and they demanded wallets from Sidhue, Khedekar, and Sharma. The two black males fled the scene in a light-colored older model Mercedes-Benz which had been parked nearby. Sharma, at trial, stated that the defendant "looked like" one of the robbers.

Gamso testified that she, along with Wayne Donnell Jones and the defendant, went to the Zoo in defendant's car, an older model blue Mercedes. She further testified that she met the victims as she was leaving the club, and when she made it to the car, she heard Jones ask for defendant's gun. She further testified that she attempted to stop Jones but he "just pulled away". Jones and the defendant then left in the direction of the foreigners.

Later, Gamso was picked up about a block away by Jones and the defendant, who gave her a credit card belonging to Sharma. When she attempted to purchase gasoline with the stolen card several hours later in the morning, the police was called and she was apprehended. While she was talking to the police, the

defendant and Jones, who had driven by several times, stopped and walked over to talk to her, and they were also taken into custody. The officer identified defendant's car as an older model light blue Mercedes.

The defendant was taken to the University Police Department where he was advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). Although the defendant gave a home address, he stated that he did not wish to make a statement without counsel and he was not questioned any further at this time.

When the officer inventoried defendant's personal items, he found a receipt for a 380 caliber chrome finish automatic gun purchased at Mack's Bait Shop which was signed by the defendant. An address listed on this receipt was

different from the earlier address given by the defendant. A third address for the defendant was obtained from Gamso.

Later, the defendant was brought back down for the officer to "explain the procedure for obtaining a search warrant". During this time the officer asked the defendant to consent to the search in order to avoid having to "get the warrant judge out of bed, this being Sunday morning" to issue a warrant. The officer also explained "how much trouble it was to write one up for me since I don't write that many." While the officer was writing the affidavit and preparing the paper work to get the search warrant, he explained to the defendant that he would have to search all the residences, including his aunt's house, and go through any place in the

house where a pistol could be hidden. The defendant was worried about the fact that his aunt's house could be searched and finally stated that he would take the officer to the gun which he subsequently did.

(1)

APPEAL

On appeal to the Alabama Court of Criminal Appeals, the defendant raised the following issues:

> Whether there was not proper proof that Appellant had been previously convicted of three felony charges in which he was represented by counsel.
>
> Whether the evidence obtained from Appellant and Appellant's apartment were excludable as fruits of an illegal arrest.
>
> Whether the trial court's denial of Appellant's motion to suppress and admission of evidence pertaining to Appellant's gun was in violation of Appellant's rights

under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 5 and 6 of the Alabama Constitution of 1901.

Whether the evidence was insufficient to support the conviction.

Whether the trial court erred in not giving Appellant's requested jury instruction or identification.

In a written opinion, the Court of Criminal Appeals made the following findings of law:

1) the evidence was sufficient to sustain the conviction of robbery by the use of force;

2) that the trial court was correct in denying to charge the jury on the identification issue;

3) that the pistol was discovered as a direct result of interrogation in violation of his Fifth Amendment right to counsel as stated in Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), and that it was reversible error to admit it into evidence;

4) Although the Court did not address the issue directly, it noted that some prior convictions did not meet the statutory requirement for admission.

(2)

REHEARING

On Rehearing, the State argued that the Court of Criminal Appeals should have applied the inevitable discovery exception to the exclusionary rule and should have held evidence of the gun admissible.

The defendant, also filed for Rehearing, arguing that the evidence was insufficient to sustain the conviction, that there was no probable cause for his arrest and that the Court erred in denying to give his requested jury instruction on identification.

The Court of Criminal Appeals extended its opinion to include a discussion of the inevitable discovery rule. On the ground that it was "speculative" to assume that the officers

would have found the weapon without illegal help from the defendant, the Court again affirmed the conviction.

(3)

CERTIORARI IN THE ALABAMA SUPREME COURT

Both Parties petitioned the Alabama Supreme Court for a writ of certiorari. The State raised the following issues:

I.

WHETHER A DEFENDANT WHO HAD GIVEN NOTICE THAT HE DOES NOT WISH TO BE QUESTIONED WITHOUT A LAWYER MAY THEREAFTER GIVE CONSENT TO A SEARCH OF HIS HOME WITHOUT ADVISE FROM COUNSEL? YES

II.

WHETHER THE INEVITABLE DISCOVERY RULE CAN BE USED TO AFFIRM A CONVICTION IN A CASE WHERE OFFICER SEARCHED A HOME WITHOUT A WARRANT, BUT HAD AMPLE PROBABLE CAUSE TO OBTAIN ONE, WAS IN THE PROCESS OF OBTAINING IT, AND WOULD HAVE OBTAINED ONE HAD THE DEFENDANT

DECIDED NOT TO CARRY THE OFFICERS TO THE HOME TO LOCATE THE WEAPON IN ORDER TO AVOID HAVING HIS AUNT'S HOUSE SEARCHED BY THE OFFICERS?

In his petition, the Defendant raised the following issues:

I.

WHETHER THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION?

II.

WHETHER THE TIRAL COURT ERRED IN NOT GIVING PETITIONER'S REQUESTED JURY INSTRUCTION ON IDENTIFICATION?

III.

WHETHER THE EVIDENCE OBTAINED FROM PETITIONER AND PETITIONER'S APARTMENT WERE EXCLUDABLE AS FRUITS OF AN ILLEGAL ARREST?

Both petitions were denied without comment.

## SUMMARY OF THE ARGUMENT

1) The State is not required to prove to an "absolute certainty" that evidence would have been found without illegal assistance from the defendant before the Court can allow the evidence into trial under the inevitable discovery rule.

2) It is not speculative to assume that police officers would have sought a warrant to search the home if the defendant had not consented to the search.

3) It is not speculative to assume that trained police officers would have found the gun under some clothes in a closet drawer without any assistance from the defendant.

## ARGUMENT

### I.

### THE STATE DOES NOT HAVE TO SHOW TO AN "ABSOLUTE CERTAINTY" THAT THE EVIDENCE WOULD HAVE BEEN DISCOVERED ABSENT THE ILLEGAL QUESTIONING OF AN ACCUSED BEFORE A COURT CAN APPLY THE "INEVITABLE DISCOVERY" EXCEPTION TO EXCLUSIONARY RULE TO ADMIT THE EVIDENCE.

Long before the Supreme Court adopted the "inevitable discovery exception" to the exclusionary rule in Nix v. Williams, the exception had been employed by "the 'vast majority' of all courts, both state and federal". Nix, supra, L.Ed.2d at 385 [Footnote 2]. However, when the Court in Nix adopted the exception, it did not present any guidance on the contours of the exception. United States v. Cherry, 759 F.2d 1196 (5th Cir. 1984). Because of

the confusion that has arisen over the meaning of "inevitability", this issue is presented to this Court for review and resolution.

In the opinion on this case, the Alabama Court of Criminal practically held that "inevitability" meant absolute certainty. The Opinion staes:

> "At the very least, the Nix opinion indicates the word 'inevitable' is to be taken literally." [Court of Criminal Appeals' Opinion, page 19].

However, this definition of inevitability runs counter to other authorities from which the inevitable discovery theory was derived, and this definition does not comport with the facts and meaning of the Nix decision itself.

The decision in United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980), a forerunner of Nix, conflicts with the

Court of Criminal Appeals' decision in this case. In Brookins, the Fifth Circuit held that the prosecution only has to show a "reasonable probability" that the evidence would have been discovered absent any illegal action on behalf of the police. Id at 1044. That the definition of "inevitability" in the context of the exception meant "reasonable probability" was also adopted by the Circuit Courts of Appeals in United States v. Cherry, supra, United States v. Roper, 681 F.2d 1354 (11th Cir. 1982) and in United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984), cases which, ironically, were cited by the Court of Criminal Appeals in its opinion.

State courts that have considered the showing necessary to bringing the

evidence within the orbit of the inevitable discovery exception have rejected the notion that absolute certainty is required. Note the following statement:

> "In the first place, the label 'inevitable discovery' is inaccurate and therefore misleading. The doctrine does not call for certitude as the literal meaning of the adjective 'inevitable' would suggest. What is required is that there be a very high degree of probability that the evidence would have been obtained independently of the tainted source." [Emphasis Added].

People v. Payton, 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224 (1978).[2]

---

[2]See U. S. v. Roper, supra where the Court noted that the "inevitable discovery" is misnamed in that it is not only applicable where the discovery is "inevitable" but also where there was a "reasonable probability" that the evidence would have been discovered by "legal means". Id. at 681 F.2d 1358.

The Alabama Court of Criminal Appeals' opinion ignores the facts of Nix itself. The Nix decision necessarily entertained a reasonable amount of speculation because it could not be said with absolute certainty that the body would have been found absent the information illegally obtained from the defendant. The decision of the Alabama Court of Criminal Appeals should be overruled on its definition of inevitability.

II.

(A)

IT IS A "REASONABLE PROBABILITY" WITH THE MEANING OF NIX TO ASSUME THAT POLICE OFFICERS, WHO HAD PROBABLE CAUSE TO BELIEVE THAT THE ROBBERY WEAPON WAS WITHIN ONE OF THE THREE ADDRESSED LISTED FOR THE DEFENDANT, WOULD HAVE SEARCHED ALL THREE RESIDENCES IN AN ATTEMPT TO LOCATE THE WEAPON.

The Court of Criminal Appeals never disputed the State's claim that the officers had probable cause to obtain a search warrant for each of the three residences listed as addresses for the defendant, and that a search warrant would have been obtained by the officers if the defendant had not consented to take them to the weapon.

While the Court of Criminal Appeals apparently conceded that probable cause

for the search warrant existed,[3] the Court nevertheless declined to apply the inevitable discovery exception on the ground that it is "speculative" to assume that the officers would have presented the warrant to a Magistrate if there had been no cooperation from the defendant. Even with due deference to the Court of Criminal Appeals, this conclusion is simply incredible. It cannot be seriously contended that police officers in general would not have followed up on any and all leads to solve a crime, and it is

---

[3]Under Alabama law, a search warrant can be issued if the affidavit supporting the warrant states facts the justify a reasonable probability that the articles are where the affiant says they are. Lewis v. State, 426 So.2d 932 (Ala. Cr. App. 1982).

certainly erroneous to make that conclusion in the instant case.[4]

The State simply submits that the question of whether the police officers in this case would have followed up on the leads by presenting their evidence to judge to secure a warrant is not the type of "speculative elements" mentioned in Nix, supra; in fact, based upon the officer's testimony, it is totally certain that a warrant would have been sought.

---

[4]Prior to the defendant's consent to the search, the officer had started writing out the affidavit for the search warrant for presentation to the warrant judge [R-9, 11]. In fact, the defendant consented because he did not want the officers to get a warrant and search the home of his elderly grandmother and aunt, which was one of the addresses listed as his residence. [R-11, 18].

II.

(B)

IT IS A "REASONABLE PROBABILITY" THAT THE OFFICERS WOULD HAVE FOUND THE WEAPON DURING A SEARCH OF THE HOUSE EVEN IF THERE HAD BEEN NO ASSISTANCE FROM THE DEFENDANT.

An additional holding by the Court of Criminal appeals in its declination to apply the inevitable discovery rule is that it is speculative under Nix to assume that the officers would have eventually located the gun during the search without the assistance which had been given by the defendant. This conclusion, like the conclusion pertaining to the search warrant, ignores the facts of this case.

In the long line of cases recognizing the inevitable discovery exception prior to Nix, the courts

clearly held that the evidence found pursuant to an illegal search was admissible unless there was a showing that the evidence would not have been found during "normal police work investigation". United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980), citing Gissendanner v. Wainwright, 482 F.2d 1293 (5th Cir. 1973). The Brookins court applied a "reasonable probability" test in deciding whether the evidence would have been found by the police through normal investigations. Id. at 614 F.2d 1037, 1048.

Application of a reasonable probability standard would certainly lead to the conclusion that the officers would have located the gun absent the cooperation of the defendant. The investigating officer was well-trained

and experienced,[5] and the gun was found in a relatively obvious place[6]. Based on these facts, it is more "speculative" to assume that the officers would not have found the gun than to assume that the gun would have eventually been located.

For the reason stated herein, the Alabama Court of Criminal Appeals' application of the inevitable discovery to void this conviction should be reversed.

---

[5]The investigating officer was Sgt. Larry Montgomery who had been with the University of Alabama Police Department for some time. [R-3].

[6]When the defendant led Montgomery to the gun, they found the gun under some underwear in the top drawer of a built-in closet located in the living room [R-12].

## CONCLUSION

In conclusion, the Petitioner submits the following:

1) The inevitable discovery exception does not require that the State prove to an absolute certainty that the evidence would have been found absent any assistance of the defendant;

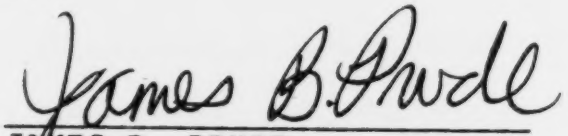
2) That is it not speculative within the concept of Nix v. Williams to assume that police officers with probable cause to obtain a warrant would have presented evidence to a Judge and obtained a warrant if there had been no assistance by the defendant;

3) That it is not "speculative" within the meaning of Nix to assume that good police investigation would not have revealed a gun hid in an obvious location.

Therefore, Petitioner State prays that this writ be granted.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
BY-



JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General
The Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

## CERTIFICATE OF SERVICE

I, James B. Prude, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this 25 day of November, 1987, I did serve the requisite number of copies of the foregoing on the Attorney for the Respondent, by mailing the same to said attorney, first-class postage prepaid and addressed as follows:

Honorable Thomas M. Goggans
Goggans, McInnish, Bright & Chambless
Attorneys-at-Law
P.O. Box 52
Montgomery, Alabama 36101-0052

James B. Prude

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General
The Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

87-935

FILED
NOV 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

STATE OF ALABAMA,

PETITIONER - APPELLEE

VS.

KENNETH JOSEPH FORTIER, JR.,

RESPONDENT - APPELLANT

# APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT AND TO THE ALABAMA COURT OF CRIMINAL APPEALS

DON SIEGELMAN
ATTORNEY GENERAL

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General
The Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

OCTOBER TERM, 1986-87

6 DIV. 726

KENNETH JOSEPH FORTIER, JR.

V.

STATE

Appeal from Tuscaloosa Circuit Court

BOWEN, PRESIDENCE JUDGE

Kenneth Joseph Fortier, Jr., was convicted of robbery in the first degree and sentenced as a habitual offender to life imprisonment without parole. He presents four issues on appeal.

The State's evidence established that in the early morning hours of July 22, 1984, Jagjeet Sidhue, Rajesh Kedekar, and Sandeep Sharma, three University of

Alabama students, were leaving the Zoo, a local campus nightspot, when a young woman identified as Tammy Gamso approached and began to talk to Sidhue. She told him that she was waiting for two male friends. She turned around and two black males, at least one of whom was holding a pistol, accosted Sidhue, Khedekar, and Sharma, demanded and obtained the wallets belonging to the three students, and fled in the direction of a light-colored older model Mercedes-Benz parked nearby. None of the three victims was able to positively identify the defendant as one of the assailants. Sharma testified that, although he could not be sure, he thought the defendant "looked like" one of the two men who had robbed him and his companions.

Tammy Gamso testified that she, Wayne Donnell Jones, and the defendant went to the Zoo bar on the evening of July 21, 1984, in the defendant's car, an older model blue Mercedes. As they left she met and talked with a foreigner and then walked back to the Mercedes, where she heard Jones tell the defendant that he "wanted the gun." Ms. Gamso stated that she "reached out to Wayne [Jones] and told him not to and he just pulled away." Jones and the defendant then left the car and headed in the direction of the foreigner with whom Ms. Gamso had spoken earlier.

Ms. Gamso was picked up about a block away by Jones and the defendant, who gave her a credit car bearing Sharma's name. She was apprehended several hours later after she attempted

to purchase gasoline with the stolen credit card. Shortly after the police arrested her, she saw Jones and the defendant, wearing the same clothes they had worn during the robbery, drive by the defendant's Mercedes. Fifteen minutes later, wearing different clothes, they drove up again, stopped and walked over to Ms. Gamso, and were taken into custody by the police. The Tuscaloosa police officer who apprehended them stated that they had alighted from an older model light blue Mercedes.

I

The defendant maintains that there was insufficient evidence to convict him of robbery by the use of force as charged in the indictment because (1) aiming a gun at the victims established only a threat of the use of force; (2) the testimony of accomplice Tammy Gamso was

uncorroborated; and (3) he was not positively identified by any of the victims.

In Lewis v. State, 469 So. 2d 1291 (Ala. Cr. App. 1984), affirmed sub nom. Ex parte Blake, 469 So. 2d 1301 (Ala. 1985), this court held "as a matter of law, that brandishing [a] weapon constitute[s] both the use of force and the threat of force .... [A]iming a gun at the victim constitutes either the force or the intimidation required for robbery." 469 So. 2d at 1298. See also Shedd v. State, [Ms. 6 Div. 181, March 24, 1987] ____ So. 2d ____ (Ala. Cr. App. 1987).

The defendant never directed the trial court's attention to the issue of accomplice corroboration. At the close of the State's case he moved for a "judgment of acquittal on all charges"

without stating grounds, and, in the alternative, he requested charges on lesser included offenses. He argued his alternative request and provided the court with a citation of authority allegedly supporting the giving of lesser included offense charges. Following his conviction he filed a "Motion for Judgment of Acquittal After Verdict" pursuant to Rule 12.3, A.R.Cr.P.Temp. "on the grounds that there was insufficient evidence to convict defendant." The court charged the jury that whether or not Tammy Gamso was an accomplice was a question of fact for their determination and then outlined for the jury the principles requiring corroboration of accomplice testimony. The defendant made no objections to this part of the court's oral charge and tendered no requested

charges defining "accomplice" or stating the necessity for corrobation of an accomplice's testimony. Under the law prevailing prior to Ex parte Maxwell, 439 So. 2d 715 (Ala. 1983), and Rule 12.3 A.R.Cr.P.Temp., the defendant would not have preserved the issue of corroboration for our review. See Ward v. State, 376 So. 2d 1112, 1115-16 (Ala. Cr. App.), cert. denied, Ex parte Ward, 376 So. 2d 1117 (Ala. 1979). See also Alexander v. State, 281 Ala. 457, 458, 204 So. 2d 488, 489-90 (1967) cert. denied, 390 U.S. 984, 88 S. Ct. 1107, 19 L. Ed. 2d 1284 (1968). Compare Dunnaway v. State, 479 So. 2d 1331, 1336-37 (Ala. Cr. App. 1985).

However, in Maxwell, the Alabama Supreme Court held the following:

> "To preserve the issue for appeal, it is necessary for defendant to state his grounds upon moving to exclude

> evidence; however, it is not necessary to draw the trial court's attention to the particular defect. It is sufficient that the defendant state the ground that the prosecution has failed to make a prima facie case." 439 So. 2d at 717.

Although the defendant's first motion for judgment of acquittal (made at the close of the State's case) stated no grounds, his post-verdict motion was based upon the claim that there was "insufficient evidence to convict defendant." Rule 12.3(a) states that "[i]t shall not be necessary to the making of the motion after a verdict or judgment of conviction that a similar motion have been made prior to the submission of the case to the factfinder." If a defendant is not precluded from testing the sufficiency of the State's case via a post-verdict motion under Rule 12.3 by his failure to

have made an earlier motion under Rule 12.2, then it followed that he is not foreclosed from challenging the State's case by way of grounds stated in a Rule 12.3 motion which were not advanced in his earlier Rule 12.2 motion. We must, therefore, determine whether the State's case was legally sufficient insofar as it related to the accomplice corroboration issue.

The first question is whether Tammy Gamso was an accomplice.

> "Whether a witness is an accomplice may be a question of law or fact, depending on the circumstances. Doss v. State, 220 Ala. 30, 123 So. 231 (1929). However the question of complicity is usually a question of fact; it becomes a question of law only where the court is clearly convinced by a preponderance of the evidence that the witness could have been indicted and convicted of the same charge of a felony for which the defendant is on trial and that the witness freely

participated in the crime. Where there is no conflict in the testimony, the question of whether a witness is an accomplice is a question of law for determination by the trial court. Pryor v. State, 47 Ala. App. 706, 260 So. 2d 614 (1972).

"'The question of law for the court resolves itself into one of undisputed evidence. If this, taken altogether most favorably toward the noncomplicity of the witness, still leaves unchallenged acts which would support a verdict of guilt of the witness, then the court, if requested, must require the State to adduce corroboration.' Leonard, supra, 43 Ala. App. 464, 192 So. 2d 469.

"Thus where there is doubt or dspute whether a witness is in fact an accomplice, the question is for the jury and not the trial court. Skumro v. State, 234 Ala. 4, 170 So. 776 (1936). Where there is doubt whether a witness is in fact an accomplice, and the testimony is susceptible to different inferences on that point, that question is for the jury. Sweeney v. State, 25 Ala. App. 220, 143 So. 586 (1932); Horn v. State, 15 Ala. App. 213, 2 So. 768 (1916)."

Jacks v. State, 364 So. 2d 397, 403 (Ala. Cr. App.), cert. denied, Ex parte Jacks, 364 So. 2d 406 (Ala. 1978).

Tammy Gamso neither admitted nor denied her participation in the robbery. She testified to her presence at the scene, her conversation with one of the victims, her attempt to dissuade Jones from leaving the car with the gun, and her knowing receipt and use of the property taken in the robbery. Compare Yarber v. State, 375 So. 2d 1229, 1230 (Ala. 1978) (where witness denied his participation in crime for which defendant was charged, complicity was a disputed question of fact for the jury); Daniels v. State, 50 Ala. App. 88, 91, 277 So. 2d 364, 367 (1973) (where witness was present at the scene of the crime but denied intent to commit the offense,

complicity was a jury issue); Jacks v. State, supra (where witness was present at scene of offense and denied prior knowledge of companion's intent to commit the crime but admitted to acts making him an accessory after the fact, question whether he was an accomplice was for the jury).

While "mere presence of a witness at the scene of a crime where he does nothing to aid and abet is insufficient to show him to have been an accomplice," Daniels v. State, 277 So. 2d at 367; Jacks v. State, supra, the jury may have believed that Ms. Gamso's engaging one of the victims in conversation immediately prior to the robbery amounted to more than mere presence and constituted a ploy to distract the victims' attention as a means of facilitating the offense. On the other hand, when viewed in connection

with Ms. Gamso's later testimony that, as Jones left the defendant's car with a gun, she reached out and "told him not to," Ms. Gamso's conduct may have been viewed by the jury as noncomplicitous in the robbery itself.

The fact that Ms. Gamso received and attempted to use the victim's property, knowing it to have been stolen, does not make her an accomplice to the robbery unless she knew in advance that the robbery would be committed and intended to aid and abet its commission. See Humber v. State, 466 So. 2d 165 (Ala. Cr. App. 1985).

> "The generally accepted rule is that 'one who knowingly receives stolen property from the thief is not to be treated as an accomplice of the thief for purposes of corroboration in a trial of the thief for the principal offense.' ...
>
> "An exception to this general rule is that 'a receiver of the

> stolen property is an accomplice of the thief for purposes of corroboration whenever there has been a prearranged plan or conspiracy between the receiver and the thief concerning the theft of, and subsequent purchase of, the property.' ... "[T]he receiver is an accomplice where he knew in advance that the theft would be committed, and agreed to receive the property which might be stolen.' ...'[W]here the receiver participated in the theft as by aiding, abetting, or inducing it, or by joining in a prearranged plan whereby one is to steal the property and the other is to buy it, he is an accomplice of the thief.'" Humber v. State, 466 So. 2d at 166-67 (citations omitted).

Based on the foregoing principles, Ms. Gamso's testimony was susceptible to different inferences regarding whether or not she was an accomplice in the robbery. Therefore, she was not an accomplice as a matter of law. See Yarber v. State, supra; Humber v. State, supra; Jacks v. State, supra; Daniels v. State, supra.

"In order for a defendant to invoke the §12-21-222 prohibition mandating corroboration of an accomplice's testimony, the evidence must present an undisputed question of fact for the trial judge that the witness giving the testimony is an accomplice." Washington v. State, 401 So. 2d 236, 239 (Ala. Cr. App.), cert. denied, Ex parte Washington, 401 So. 2d 241 (Ala. 1981).

Our conclusion that Ms. Gamso's complicity was a disputed question properly submitted to the jury means that the court's denial of appellant's motion for judgment of acquittal was not error. As we observed in Washington v. State:

> "Because this issue remained a question for the jury, the denial of the appellant's motion to exclude the State's evidence for insufficient corroboration was not error. The ury was appropriately charged, the issue was placed

> fairly before them, and was determined adversely to appellant. Having determined that the issue of whether the witness was an accomplice preseted a question of fact for the jury, we pretermit discussion of the sufficiency of the corroborative evidence." Washington v. State, 401 So. 2d at 239, 40. See also Jacks v. State, 364 So. 2d at 404; Daniels v. State, 277 So. 2d at 367.

The defendant's final challenge to the sufficiency of the State's evidence -- that none of the victims identified him as one of the assailants -- is also unavailing. "The failure of a victim to identify the accused affects the weight and credibility of the victim's testimony, which are questions for the jury." Brown v. State, 488 So. 2d 9, 11 (Ala. Cr. App. 1986); Johnson v. State, 453 So. 2d 1323, 1328-29 (Ala. Cr. App. 1984). It is not indispensable to a conviction to have positive eyewitness

identification of the accused. Identity may be established by direct or circumstantial evidence, Cummings v. State, 356 So. 2d 779, 783 (Ala. Cr. App. 1978), and if there is enough evidence to permit the inference that the accused was the person who committed the crime then the State's case is sufficient, United States v. Darrell, 629 F. 2d 1089, 1091 (5th Cir. 1980).

Aside from the testimony of Ms. Gamso, which was sufficient in itself to identify the defendant as a perpetrator of the robbery, the State presented the additional circumstantial evidence that, several hours after a robbery in which two black males were believed to have fled in a light-colored older model Mercedes, the defendant and another back male alighted from an older model light

blue Mercedes at the location where Ms. Gamso was attempting to use a credit card stolen in the robbery. The State's evidence was sufficient to establish a prima facie case of robbery in the first degree.

II

The trial court refused to give the defendant's requested charge number 14, which reads as follows:

> "Ladies and gentlemen of the jury, I charge you that testimony concerning the identity of a person charged with a crime is to be scrutinized with extreme care. No class of testimony is more uncertain and less to be relied upon than that of identity.
>
> "The possibility of human error or mistake, and the probable likeness or similarity of objects and persons are factors that you must consider in evaluating testimony as to identity. You must be satisfied beyond a reasonable doubt and to a moral certaint as to the accuracy of the

witnesses' identification of the defendant."

In view of the fact that all of the victims stated that they could not identify the defendant, this charge was abstract and its refusal was not error.

The foregoing charge is appropriately given in cases in which there is the possibility of tainted identification testimony based, for example, upon the suggestiveness of a pretrial identification procedure, see, e.g. Henderson v. State, 373 So. 2d 1218, 1220 (Ala. Cr. App.), cert. denied, Ex parte Henderson, 373 So. 2d 1221 (Ala. 1979), or in cases in which the accuracy of the witness's identification of the defendant is contested via cross-examination or the testimony of other witnesses, see, e.g. Rowser v. State, 346 So. 2d 533, 535-36 (Ala. Cr. App), cert.

denied, Ex parte Rowser, 346 So. 2d 536 (Ala. 1977).

When the witnesses have expressly stated that they are unable to identify the defendant, it is nonsensical -- if not actually harmful to the defendant -- to warn the jury that they must be morally certain of the "accuracy of the witnesses' identification of the defendant."

III

The defendant claims that the admission of a .38-caliber automatic pistol found during a search of his apartment violated his Fourth Amendment right to be free from unreasonable searches and seizures and his Fifth Amendment right to counsel. He claims that the seizure of the firearm was tainted by his prior arrest without probable cause and by his involuntary

consent to search his apartment. He also maintains that the discovery of the weapon stemmed from police interrogation following his invocation of the right to counsel. We hold that the defendant's arrest was based on probable cause. We need not decide whether he voluntarily consented to a search of his apartment because his conviction must be reversed on the ground that the incriminating evidence was found as a direct result of police interrogation after he unequivocally invoked his right to counsel.

Following a robbery during which a gasoline credit card was taken from one of three University of Alabama students at 1:00 a.m., the University police were notified that two black males, seen in the company of a blonde female wearing a white dress with a large black belt, fled

in the direction of a light-colored older model Mercedes. Approximately four hours later, Tuscaloosa police authorities apprehended a while female matching the foregoing description as she attempted to purchase gasoline with the victim's credit card. While the female suspect was being questioned, two black males drove up in a light blue older Mercedes, approached the female and asked what was going on.

Under the circumstances, the defendant's connection with the vehicle, see Campbell v. State, 354 So.2d 325 (Ala. Cr. App. 1977), and with the suspect who was attempting to use the stolen property, compare United States v. Willis, 759 F.2d 1486, 1498 (11th Cir.), cert. denied, ___ U.S. ___, 106 S.Ct. 144 (1985) (probable cause to arrest defendant for possession of contraband on

plane came from pilot of plane who displayed defendant's motel room key), clearly warranted the Tuscaloosa police officers' believing that the defendant was one of two black males who had committed the earlier robbery. "Probable cause to arrest exists when, at the time the ... officer makes the arrest, there are reasonably trustworthy facts and circumstances sufficient, given the totality of the circumstances, to lead a reasonably person to believe there is a fair probability that the suspect is committing or has committed an offense." Fifteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals, 1984-1985, 74 Geo.L.J. 499, 518 (1986).

During the hearing on the motion to suppress, Lieutenant Larry Montgomery of the University Police Department

testified that after he informed the defendant of his Miranda rights the defendant said that he did not want to make any statements without a lawyer present. Lieutenant Montgomery did not question the defendant further at that time. Approximately two hours later, Montgomery "had the defendant brought back in order to explain the search warrant procedure" to him.

In doing an inventory of the defendant's personal effects, Lieutenant Montgomery had come across a bill of sale for a .38-caliber automatic postol. The defendant testified at the suppression hearing, that upon being brought back to Montgomery's office, he was asked by Montgomery whether the weapon described in the bill of sale was the one used during the robbery. According to the defendant, Montgomery also said it would

be "helpful" if the defendant would "take him where the gun was rather than him having to prepare the search procedure." At the suppression hearing, Lieutenant Montgomery testified as follows:

> "I explained the procedure of writing up the search warrant, ... [how] I would have to make an affidavit and get the warrant judge out of bed, this being Sunday morning, to issue me a search warrant for that particular address. I explained to him also how much trouble it was to write one up for me since I don't write that many, and then after I explained--"

Lieutenant Montgomery's testimony on this point during the suppression hearing was cut short by further questioning by the assistant district attorney. Nevertheless, at trial Lieutenant Montgomery stated the following:

> "Q [By defense counsel]: Now, did you tell him - didn't you tell him that it would be helpful if he would take you to where the gun was?

"A I told him that it would save me a lots of trouble, yes.

"Q Save you lots of trouble?

"A Yes, in writing things down.

"Q Lots of trouble, so he was trying to help you out by taking you to where the gun was, is that what you think?

"A Yes, sir.

"....

"Q [By defense counsel]: And is it not true that you told him it would be helpful if he would take you voluntarily to where the gun was?

"A [By Lieutenant Montgomery]: Helpful to me without having to do - to write up the search warrant."

"[A]n accused ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates

further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Because the defendant clearly invoked his right to counsel when he stated that he did not wish to make any statements without a lawyer present, and because the defendant clearly did not initiate further conversation witht he police (Lieutenatn Montgomery "had" the defendant brought back to him), we need only determine whether the defendant was "interrogated" by Montgomery.

> "[T]he term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions

> of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 466 U.S. 291, 301-02, 100 S.Ct. 1682, 1689-90, 64 L.Ed.2d 297 (1980) (emphasis in original).

In Innis, the defendant invoked his right to counsel and was transported in a police vehicle with at least two officers. When one officer mentioned to another officer that it would be tragic

if the gun used in the offense for which the defendant had been arrested were to be found by one of the students at a nearby school for handicapped children, the defendant immediately led the officers to the weapon. The Supreme Court held that the officer's comment was not "reasonably likely to elicit an incriminating response" and did not constitute interrogation.

Aside from the distinctions between the Fifth Amendment right to counsel and the Sixth Amendment right to counsel, see Rhode Island v. Innis, 466 U.S. at 300 n. 4, the result in Innis is difficult to square with the result in Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), the "Christian burial speech" case, see Stahl v. State, 426 So.2d 909, 916 (Ala. Cr. App. 1982), cert. quashed, Ex parte Stahl, 426 So.2d

917 (Ala.), cert. denied, 463 U.S. 1210, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983). Nevertheless, the divergent outcomes may be accounted for by at least three factual distinctions relevant here, namely: (1) In Innis, there were no indication that the police knew of the defendant's particular concern for handicapped children, 446 U.S. at 302, whereas in Brewer the officer was aware of the defendant's religious sensibilities, 430 U.S. at 402-03; (2) In Innis, the comment was ostensibly addressed to someone other than the defendant, while in Brewer the statements were made directly to the defendant, the only other person present; and (3) In Innis there was no evidence to suggest that the "remarks were designed to elicit a response," 446 U.S. at 301-02 n. 7 and 303 n. 9, whereas in Brewer the court

found that the officer "deliberately and designedly set out to elicit information" from thedefendant, 430 U.S. at 399.

In the present case, the address for the defendant listed on the firearm receipt was different from the one the defendant had given at the time of his arrest. At that time, the defendant had stated that he lived with his aunt and grandmother. Lieutenant Montgomery had received yet a third address for the defendant from Tammy Gamso. In an apparent attempt to have the defendant relate his correct address, Lieutenant Montgomery told the defendant that, whatever residence was search pursuant to the warrant, the police would have to follow the ensuring procedure:

> "[W]e would have to search every part of that house that was large enough to contain a

handgun throughout the house and if we didn't find it we would have to go through everything in the house.

"Q When you say you would have to go through everything in the house, would you have to go through all the drawers?

"A Yes, sir.

"Q You would have to go pulling cushions out of furniture?

"A I'm not sure whether I told him that, but we would have to not destroy anything but to take the cushions and stuff out, sure would, any place that could contain a handgun."

Lieutenant Montgomery testified that he "assumed at least the [defendant's] grandmother was maybe an elderly lady" and he noticed that "it seemed to bother" the defendant that a search would be conducted at the residence of his aunt and grandmother.

"A [By Lieutenant Montgomery]: ... He seemed to be worried that we would have to go down to his aunt's house.

"Q [By assistant district attorney]: Did he tell you that or just your perception in watching?

"A Perception mostly, his mannerisms and the way he acted after I explained that, and then only I guess a minute or so passed and he told me that he would take me and show me where the gun was at."

Unlike the officers in Innis, who had no reason to suspect that the defendant was "unusually disoriented or upset at the time of his arrest," 446 U.S. at 302-03, or would be especially susceptible to an appeal for the safety of handicapped children, 466 U.S. at 302, it is clear that Lieutenant Montgomery was aware that the defendant was "bothered" and "worried" at the prospect of his aunt's and grandmother's residence being searched. Focusing, therefore, on the subjective "perceptions of the suspect," it is evident that Lieutenant

Montgomery should have known that his remarks to the defendant were reasonably likely to evoke an incriminating response. Compare Ex parte Stahl, 426 So.2d at 917-18 (suspect not subjectively likely to have responded as he did to exchange with police). Unlike the situation in Innis, Lieutenant Montgomery's comments were also directly addressed to the defendant and appear to have been "designed to elicit a response," 466 U.S. at 301-02 n. 7 and 303 n. 9. Montgomery's comment that it would "save [him] lots of trouble ... in writing things down" if the defendant would show him where the gun was can only be interpreted as a deliberate attempt to elicit the whereabouts of the weapon in order to save himself the trouble of going through the warrant procedure and havint to search at least one and possibility three residences.

The defendant's response to Montgomery's interrogation did not constitute a waiver of his previously invoked Miranda rights. Although the defendant (but not Lieutenant Montgomery) testified that he was readvised of his rights upon being "brought back" to Montgomery's office, "a valid waiver of [the Miranda] right cannot be established by showing only that [the defendant] responded to further police-initiated custodial interrogation even if he has been advised of his rights." Edwards v. Arizona, 451 U.S. at 484.

We therefore hold that the pistol was discovered as a direct result of interrogation in violation of the defendant's Fifth Amendment right to counsel. Its admission was reversible error for which the defendant is entitled to a new trial.

IV

The defendant argues that the State did not properly prove, for purposes of habitual offender sentencing, that he had been convicted of three prior felonies. We need not address this issue because reversal is required on grounds just discussed. However, we note that the proof of the out-of-state convictions did not comply with Ala. code 1975, §12-21-70. With regard to the defendant's admission of the prior felony convictions, we direct attention ot Webb v. State, [Ms. 3 Div. 329, April 28, 1987] ___ So.2d ___ (Ala. Cr. App. 1987).

REVERSED AND REMANDED.

All Judges concur.

Kenneth Joseph Fortier, Jr. v. State
6 Div. 726
Tuscaloosa Circuit Court

ON REHEARING

BOWEN, PRESIDING JUDGE

Contrary to the Attorney General's argument, the "inevitable discovery" exception to the exclusionary rule, sanctioned in Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), does not change the result here. In Nix, the Supreme Court held evidence of a murder victim's body, discovered as a result of a violation of the accused's Sixth amendment right to counsel, admissible because, at the time the violation occureed, a search party had neared the site of the body and would have located it within several hours. "Except for the application of its rule to the specific facts before the Court

and its holding that the Government must establish the inevitability of discovery by a preponderance of the evidence, the Supreme Court was silent as to what constitutes an 'inevitable' discovery under the doctrine." United States v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984), cert. denied, 471 U.S. 1117, 105 S.Ct. 2362, 86 L.Ed.2d 262 (1985). See also The Supreme Court, 1983 Term, 98 Harv. L. Rev. 87, 129 (1984) (the Supreme Court "failed to specify [in Nix] necessary criteria for determining 'inevitability')."

At the very least, the Nix opinion indicates that the word "inevitable" is to be taken literally. "[I]nevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment...." Nix v.

Williams, 467 U.S. at 445 n. 5, 104 S.Ct. at 2509 n. 5.

> "The significance of the word 'would' cannot be overemphasized. It is not enough to show that the evidence 'might' or 'could' have been otherwise obtained. Once the illegal act is shown to have been in fact the sole effective cause of the discovery of certain evidence, such evidence is inadmissible unless the prosecution severs the casual connection by an affirmative showing that it would have acquired the evidence in any event. In order to avoid the exclusionary rule, the government must establish that it has not benefited by the illegal acts of its agents; a showing that it might not have so benefited is insufficient." Musgrove v. State, [Ms. 8 Div. 345, Oct. 14, 1986] ___ So.2d ___ (Ala. Cr. App. 1986) (quoting Maguire, "How to Unpoison the Fruit - The Fourth Amendment and the Exclusionary Rule," 55 J.Crim.L.C. and P.S. 307, 315 (1964) (emphasis in original). See also W. LaFave, Search and Seizure, §11.4(a) at 384 (2d ed. 1987).

There was no evidence presented in the present case to rpove that, absent the illegal questioning of the defendant as to the whereabouts of the gun, the police would have obtained a warrant for the place where the weapon was found and would have eventually located the gun. The prosecution simply did not meet its burden of proof. Nix v. Williams, 467 U.S. at 444, 104 S.Ct. at 2509 (the prosecution must "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means"); United States v. Cherry, 759 F.2d 1196, 1207 (5th Cir. 1985), cert. denied, Cherry v. United States, ___ U.S. ___, 107 S.Ct. 932, 93 L.Ed.2d 983 (1987). ("It is firmly established that, once the defendant goes forward with specific evidence demonstrating taint,

the government has the final burden of persuasion to show that the evidence is untainted"). Although Lieutenant Montgomery was in the process of writing an affidavit for a search warrant at the time he interrogated the defendant and he could have completed it, presented it to a magistrate, and he might have secured a search warrant, the fact that he did not follow that course of action makes any discussion about what he could or might have done a focus on "speculative elements" rather than "demonstrated historical facts," Nix v. Williams, 467 U.S. at 445 n. 5, 104 S.Ct. at 2509 n. 5. Compare United States v. Levasseur, 620 F.Supp. 624, 632 (E.D.N.Y. 1985) (court did not need to resort to speculation in case where affidavit for search warrant was being drafted at the time the illegality occurred because a warrant was

ultimately issued and there was no attempt to evade the Fourth Amendment). See also Commonwealth v. Benoit, 382 Mass. 210, 415 N.E.2d 818, 821 (1981) ("It is possible to surmise that the police may have failed to obtain a warrant in reliance on a mistaken belief that they had obtained a valid consent to search from the defendant").

> "[T]he alternate means of obtaining the evidence must at least be in existence and, at least to some degree, imminent if yet unrealized. If the inevitable discovery exception can be applied only on the basis of the police officer's mere intention to use legal means subsequently, the focus of the inquiry would hardly be on historical fact." United States v. Cherry, 759 F.2d at 1205 n. 10.

"Were the rule otherwise, every warrantless nonexigent seizure automatically would be legitimatized by assuming the hypothetical alternative

that a warrant had been obtained." People v. Knapp, 52 N.Y.2d 689, 439 N.Y.S.2d 871, 422 N.E.Wd 531, 536 (1981).

> "Where suppression in such a case may put the prosecution in a worse posotion because of the police misconduct, a contrary result would cause the inevitable discovery exception to swallow the rule by allowing evidence otherwise tainted to be admitted merely because the police could have chosen to act differently and obtain the evidence by legal means. When the police forgo legal means of investigation simply in order to obtain evidence in violation of a suspect's constitutional rights, the need to deter is paramount and requires application of the exclusionary rule." United States v. Cherry, 759 F.2d at 1205 (emphasis added).

We find the deterence function of the exclusionary rule particularly compelling in this case because of our conclusion that Lieutenant Montgomery's interrogation of the defendant was "a

deliberate attempt to elicit the whereabouts of the weapon in order to save himself the trouble of going through the warrant procedure and having to search at least one and possibly three residences." Ante at 17. Given Lieutenant Montgomery's stated reluctance to go through the "trouble" of "writing things down," and "get the warrant judge out of bed," we cannot assume that his illegal questioning of the defendant was anything other than an intentional shortcut to the warrant procedure. "If the [inevitable discovery] rule were applied when such a shortcut was intentionally taken, the effect would be to read out of the Fourth Amendment the requirement that other, more elaborate and protective procedures be followed." W. LaFave, Search and Seizure §11.4(a) at 382 (2d ed. 1987).

Although the Supreme Court rejected the notion in Nix that the prosecution must prove the absence of bad faith, 467 U.S. at 445, 104 S.Ct. at 2510, it did not state that the presence of intentional misconduct was irrelevant. The Court merely pointed out that normally "there will be little to gain from taking and dubious 'shortcuts' to obtain the evidence." Nix, 467 U.S. at 446, 104 S.Ct. at 2510. Other federal and state courts faced with an intentional bypass of the Fourth Amendment warrant requirement have declined to apply the inevitable discovery exception. See, e.g. United States v. Cherry, 759 F.2d at 1205 (5th Cir. 1985); United States v. Satterfield, 743 F.2d at 846 ("Because a valid search warrant nearly alwasy can be obtained after the search has occurred, a contrary

holding would practically destroy the requirement that a warrant for the search of a home be obtained before the search takes place.") (emphasis in original); State v. Johnson, 301 N.W.2d 625, 629 (N.D. 1981) ("If the inevitable discovery theory applied when a shortcut was taken, as in the instant case, the net result would be that the magistrate's determination of probable cause as required by the fourth amendment would be eliminated for all practical purposes. This we cannot do.").

OPINION EXTENDED;
APPLICATION FOR REHEARING OVERRULED.

All Judges Concur.

Supreme Court, U.S.
FILED
DEC 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-935

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1987

STATE OF ALABAMA,

Petitioner,

v.

KENNETH JOSEPH FORTIER, JR.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

# RESPONDENT'S BRIEF
# IN OPPOSITION TO CERTIORARI

By:
Thomas Martele Goggans
Attorney at Law
Suite 205
770 South McDonough St.
Montgomery, AL 36104
(205)-834-2511

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the prosecution, in order to avail itself of the inevitable discovery exception to the exclusionary rule, must prove inevitable discovery by "demonstrated historical facts capable of ready verification or impeachment"?

2. Whether the state appellate court findings and conclusion that the prosecution did not meet its burden of establishing by a preponderance of the evidence that evidence obtained in violation of Respondent's rights inevitably would have been discovered by lawful means should be respected?

## PARTIES

The caption contains the names of all parties.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

PARTIES.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED.....1

STATEMENT OF THE CASE.....4

REASONS FOR DENYING THE WRIT.....21

The petition was not timely filed.....21

The inevitable discovery question was properly decided below and is not significant enough for certiorari review anyway.....23

CONCLUSION.....32

CERTIFICATE OF SERVICE.....33

## TABLE OF AUTHORITIES

Cases:

Nix v. Williams, 467 U.S. 431 (1984).....24, 25

Constitutional Provisions:

Fourth Amendment to the United States Constitution...28, 29

Article I, Section 5, Alabama Constitution fo 1901.....28, 29

Statutes:

Section 15-5-3, Code of Alabama...28, 29

Court Rules:

Rule 20.1, Rules of the Supreme Court of the United States.....21

## OPINIONS BELOW

The statement of the opinions below contained in the certiorari petition is correct.

## JURISDICTION

Petitioner seeks review of the judgment of a state court of last resort in a criminal case pursuant to 28 U.S.C. Section 1257(3). The certiorari petition was filed more than sixty (60) days after the entry of judgment by the Supreme Court of Alabama, and the period of time for applying for a writ of certiorari has not been extended by a Justice of this Court. Petitioner's application for a writ of certiorari is out of time and jurisdiction should be declined.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

(1) Fourth Amendment to the United States Constitution, which provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(2) The Fifth Amendment to the United States Constitution which provides: "No person shall ... be compelled in any criminal case to be a witness against himself...."

(3) Rule 20.1, Rules of the Supreme Court of the United States, which provides:

"A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort ... shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for applying for a writ of

certiorari in such cases for a period not exceeding 30 days."

(4) Article I, Section 5 of the Alabama Constitution of 1901, which provides: "That the people shall be secure in their persons, houses, and papers, and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation."

(5) Section 15-5-3. Code of Alabama, which provides: "A search warrant can only be issued on probable cause, supported by an affidavit naming and describing the person and particularly describing the property and the place to be searched."

## STATEMENT OF THE CASE

### Procedural Background

The July 1984 term of the Tuscaloosa County, Alabama Grand Jury returned an indictment against Respondent, Kenneth Joseph Fortier, Jr., charging him with robbery in the first degree. Fortier entered a plea of not guilty. Fortier was tried before a jury and was found guilty of robbery in the first degree. Fortier was sentenced under the Alabama Habitual Felony Offender Law to life imprisonment without possibility of parole.

The Alabama Court of Criminal Appeals reversed Fortier's conviction and remanded the case for a new trial. The Alabama Court of Criminal Appeals based its holding upon a finding that incriminating evidence introduced at

trial was found as a direct result of police interrogation of Fortier after he had unequivocably invoked his right to counsel.[1] On rehearing, the Alabama Court of Criminal Appeals specifically rejected the State of Alabama's argument that the incriminating evidence should have been admitted under the inevitable discovery exception to the exclusionary rule because it found that the State of Alabama had failed to meet its burden of establishing that the incriminating evidence inevitably would have been discovered by lawful means. The Alabama Court of Criminal Appeals quoted this Court as follows: "'Inevitable discovery

---

[1] Respondent also argued that the evidence was obtained through an involuntary consent to search. However, the Alabama Court of Criminal Appeals did not address that question because it reversed on the basis referred to hereinabove.

involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment....'" Nix v. Williams, 467 U.S. [431,] 445 n.5 (1984). The Alabama Court of Criminal Appeals found:

> "There was no evidence presented in the present case to prove that, absent the illegal questioning of the defendant as to the whereabouts of the gun, the police would have obtained a warrant for the place where the weapon was found and would have eventually located the gun. The prosecution simply did not meet its burden of proof. Nix v. Williams, 467 U.S. at 444, 104 S.Ct. at 2509 (the prosecution must 'establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means')...." (Emphasis in original)

The State of Alabama filed a petition for writ of certiorari with the Supreme Court of Alabama on June 23,

1987.[2] The Supreme Court of Alabama denied the State of Alabama's petition

---

[2] Rule 39 (k) of the Alabama Rules of Appellate Procedure provides:

> "[t]he review of [decisions of the Alabama Court of Criminal Appeals by the Supreme Court of Alabama] will ordinarily be limited to the facts stated in the opinion of the [Alabama Court of Criminal Appeals]. If the petitioner is not satisfied with that statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to the request, petitioner may copy the statement in the petition to ...[the Supreme Court of Alabama] with references therein to the pertinent portions of the clerk's record and reporter's transcript, and it will be considered along with the statement of facts in the opinion of the ... [Alabama Court of Criminal Appeals], if found to be correct."

In its application for rehearing with the Alabama Court of Criminal Appeals, the State of Alabama did not file any request for additional or corrected facts pursuant to Rule 39(k) of the Alabama Rules of Appellate Procedure.

for writ of certiorari on September 25, 1987.[3]

## Factual Background

The summary of the trial evidence contained in the opinion of the Alabama Court of Criminal Appeals is essentially

---

[3] Rule 41(b) of the Alabama Rules of Appellate Procedure provides:

> "The timely filing of a petition for writ of certiorari in the ... [Alabama Supreme Court] shall stay the issuance of the certificate of judgment by the ... [Alabama Court of Criminal Appeals]. Upon the filing of a copy of an order of the ... [Alabama Supreme Court] denying the petition for certiorari, the certificate of judgment of the ... [Alabama Court of Criminal Appeals] shall issue immediately...."

Respondent, on or about November 25, 1987, filed a motion with the Alabama Court of Criminal Appeals requesting a stay of judgment, or, alternatively, seeking to have the execution of the judgment withdrawn. That motion was denied by the Alabama Court of Criminal Appeals on November 30, 1987.

correct.

Prior to trial, Respondent filed a motion to suppress evidence. (R. 436-437). The following was adduced at a pretrial hearing on that motion:

Larry Montgomery, a sergeant with the University of Alabama Police Department, was called around 2:00 a.m. on July 22, 1984 and informed that a robbery had been committed by two black males and that a white female had been in the area of the robbery and was believed to have been with the two black males at the time of the robbery. (R. 4). According to Montgomery, the robbery had occurred shortly after 1:00 a.m. that day. (R. 5). Montgomery testified that he was called back around 5:30 or 6:00 a.m. that morning and informed that the Tuscaloosa, Alabama Police Department had

three suspects in custody. (R. 4). According to Montgomery, around 4:00 a.m. officers with the Tuscaloosa Police Department had stopped a white female, Tammy Gamso, matching the description of the white female believed to have been with the two black male robbery suspects after she attempted to use a credit card stolen from one of the robbery victims. (R. 5). While the Tuscaloosa Police were questioning Gamso on the scene, two black males, Wayne Donnell Jones, and Fortier, drove up in a Mercedes-Benz which, according to Montgomery, matched the description of an automobile near the scene of the robbery. (R. 5, 6). The Tuscaloosa Police took Jones and Fortier into custody also. (R. 6).

Montgomery testified that he arrived at the University Police Station around

6:00 or 6:30 a.m. and that he first read Fortier his Miranda rights and Fortier responded that he did not want to make any statements without a lawyer present. (R. 6-7). At 7:03 a.m., Fortier signed an explanation of rights form and indicated that he did not want to make a statement without a lawyer being present. (R. 7, 16).

Montgomery then had Jones and Gamso brought into his office. He talked with them for two to two and a half hours and obtained statements from them. (R. 6, 16).

Montgomery had obtained a receipt from Mack's Bait Shop for a 380 caliber chrome finish automatic pistol from Fortier. (R. 8) Around 9:00 or 10:00 a.m., Montgomery had Fortier brought back to his office. According to

Montgomery, his purpose for doing so was "[t]o explain the procedure for going on a search warrant to him and to make sure that he had an understanding." (R. 19). Fortier testified that Montgomery told him that he had taken statements from Jones and Gamso and that he wanted him to make a statement about the robbery. (R. 29). Fortier also stated that Montgomery asked him questions about whether the gun purchased from Mack's Bait Shop had been used in the robbery. (R. 29). In regard to searching anything, Montgomery testified that he did not think he discussed obtaining a search warrant for Fortier's automobile. (R. 16-17). However, Fortier testified that Montgomery did say that they would like to search his car and that, in doing so, they would remove the seats and go

through the entire car. (R. 23-24). At the time of this second encounter between Montgomery and Fortier, Montgomery had two addresses for Fortier. (R. 8-9). Montgomery was aware that one of the addresses was that of Fortier's aunt. (R. 17). Montgomery testified: "He told me that his aunt and I believe his grandmother also lives there. He didn't tell me their age. I assumed at least the grandmother was maybe an elderly lady." (R. 17). Fortier testified that his aunt was in her sixties and that his grandmother was ninety-three and in bad health. (R. 24). Montgomery "explained" the procedure for writing up a search warrant to Fortier. (R. 9). He stated that he told Fortier that he "would have to make out an affidavit and get the warrant judge out

of bed .. to issue a search warrant" and "explained to him also how much trouble it was to write one up ... since he didn't write that many..." (R. 9). Montgomery testified that he told Fortier that he would have to go to his aunt's house and search every part of the house that was large enough to contain a handgun and that if he didn't find it he would have to go through everything in the house and would move whatever was in the way. (R. 10, 18, 20). According to Montgomery's own testimony, "it seemed to bother [Fortier] that [he] would have to go down" to his aunt's house. (R. 11). Montgomery said he based his conclusions upon "[p]erception mostly, [Fortier's] mannerisms and the way he acted after [he] explained the search warrant procedure to him." (R. 11). Montgomery

testified that during this second encounter with Fortier, he divided his time between "explaining search warrant procedure to Fortier and looking for forms, affidavits, and everything." (R. 18). Montgomery did not state that he told Fortier that he had a right not to consent to the search. Montgomery stated that he had started writing an affidavit for a search warrant when Fortier told him that he would take him and show him where the gun was located. (R. 11-12). Fortier testified that although Montgomery had not used the words "tear up" he felt that his aunt's house would be torn up if searched. (R. 27). He stated that he did not want to put his grandmother through the pain of the police looking through the house. (R. 28). He said that he felt intimidated

and that he did not want them to tear up his aunt's house because his grandmother was quite old and in bad health. Fortier further stated that because of his intimidation, he agreed to take Montgomery to the gun. (R. 24). Around 11:00 a.m. or 11:30 a.m. Fortier took Montgomery and a Tuscaloosa policeman to his apartment (not his aunt's house) and showed them the location of the gun. (R. 12-13).

The Circuit Court of Tuscaloosa County denied Fortier's motion to suppress. (R. 30).

Larry Montgomery's testimony at trial was similar to his testimony at the suppression hearing. He testified that he first received information concerning the robbery around 2:15 or 2:30 a.m. and that his next contact with

the case was around 5:30 or 6:00 a.m. when he recieved information that three suspects were in custody. (R. 126-127). Montgomery testified that he spoke with Fortier and read him his Miranda rights. (R. 128). Montgomery indicated that he had already obtained a statement from Gamso and that he subsequently obtained a statement from Jones. (R. 129). Montgomery testified that between 9:30 and 10:30 a.m., he saw Fortier again and informed him of the possibility of obtaining a search warrant, told Fortier what he was looking for, and received permission to search from Fortier. (R. 130).[4] Outside the presence of the jury,

---

[4] At that point, testimony was presented outside the presence of the jury, and, apparently, a transcript of the pretrial suppression proceedings was offered for the consideration of the trial judge (a different judge than the one who presided over the pretrial

Montgomery again testified that he read Fortier his Miranda rights. (R. 161). His testimony indicated that at 7:03 a.m., Fortier gave a written statement that he did not wish to make a statement without a lawyer present, that he stopped questioning Fortier, and that Fortier was taken back to the patrol supervisor's office. (R. 161, 165, 166). Montgomery testified that between 9:30 and 10:30 a.m., after he had talked with Jones, he had Fortier brought back to his office. (R. 162, 166, 167, 168). According to Montgomery he had two addresses for Fortier. (R. 162, 163). Montgomery testified that he explained to Fortier that he did not want him to answer any questions but with his rights in mind

---

suppression hearing). (R. 130-132, 133-160).

just wanted to explain something to him about search warrant procedure and what would be involved in a search of his apartment and his aunt's house. (R. 161, 167, 168). Montgomery testified that he touched on Fortier's apartment but started with his aunt's house. (R. 167). According to Montgomery, he explained that in searching Fortier's aunt's house he would have to look through everything in the house that would contain an object small enough to handle a gun. (R. 163). Montgomery testified that he had started writing up an affidavit when Fortier stopped him and said that he would show him where the gun was located and that he took him to his apartment and showed him the gun. (R. 163). Montgomery did not obtain a written waiver from Fortier pertaining to the search for the gun. (R.

170). The trial judge ruled the evidence to be admissible. (R. 170). Back in the presence of the jury, Montgomery again related the process of his talking with Fortier and obtaining the gun. (R. 123-180). As to his start on an affidavit, Montgomery testified that he had only begun an introductory paragraph containing his own biographical information. (R. 176). The gun and clip were introduced into evidence. (R. 180).

## REASONS FOR DENYING THE WRIT

### 1. The petition was not timely filed.

Under Rule 20.1 of the Rules of this Court, a petition for writ of certiorari to review the judgment of a state court of last resort is due to be filed within sixty (60) days of the entry of such judgment. In this case, the judgment of the Alabama Supreme Court denying the State of Alabama's petition for writ of certiorari was entered on September 25, 1987. The State of Alabama's certiorari petition in the instant proceeding shows a certificate of service of November 25, 1987, sixty-one (61) days after the Alabama Supreme Court's denial of the State of Alabama's state certiorari

petition.[5] The State of Alabama's certiorari petition in the instant proceeding was not received by the Clerk of this Court until November 30, 1987, sixty-six (66) days after the Alabama Supreme Court's denial of the State of Alabama's state certiorari petition. Thus, the State of Alabama's certiorari petition in the instant proceeding was not timely filed. For that reason, Respondent submits that the petition should be denied.

---

[5] Counsel for Respondent has not received a copy of a notarized statement of counsel for Petitioner setting forth the details of the mailing of Petitioner's certiorari petition. Counsel for Respondent did not receive a copy of Petitioner's certiorari petition until December 1, 1987. The envelope in which the undersigned counsel received the copy of Petitioner's certiorari petition was not postmarked until November 30, 1987.

2. The inevitable discovery question was properly decided below and is not significant enough for certiorari review anyway.

The Alabama Court of Criminal Appeals based its reversal of Respondent's conviction upon a finding that incriminating evidence introduced at trial was found as a direct result of police interrogation of Respondent after he had unequivocably invoked his right to counsel. On rehearing, the Alabama Court of Criminal Appeals specifically rejected Petitioner State of Alabama's argument that the incriminating evidence should have been admitted under the inevitable discovery exception to the exclusionary rule because it found that Petitioner had failed to meet its burden of establishing that the incriminating evidence inevitably would have been

discovered by lawful means.

The State of Alabama incorrectly posits that the Alabama Court of Criminal Appeals applied a test for determining inevitable discovery which does not comport with this Court's holding in Nix v. Williams, 467 U.S. 431 (1984). To the contrary, the Alabama Court of Criminal Appeals did not deviate from this Court's holding in Nix v. Williams, 467 U.S. 341. In accordance with this Court's holding in Nix v. Williams, 467 U.S. 341, the Alabama Court of Criminal Appeals simply and properly focused its evaluation of the evidence to historical facts demonstrated, or not demonstrated, as the case may be, by the State of Alabama rather than resort to speculation. The Alabama Court of Criminal Appeals quoted from this

Court's opinion in Nix v. Williams, 467 U.S. 431, as follows: "'Inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment....' Nix v. Williams, 467 U.S. [431,] 445 n.5 (1984)." The Alabama Court of Criminal Appeals held the State of Alabama to this requirement.

Applying the proper rule of law to the facts, the Alabama Court of Criminal Appeals found:

> "There was no evidence presented in the present case to prove that, absent the illegal questioning of the defendant as to the whereabouts of the gun, the police would have obtained a warrant for the place where the weapon was found and would have eventually located the gun. The prosecution simply did not meet its burden of proof. Nix v. Williams, 467 U.S. at 444, 104 S.Ct. at 2509 (the prosecution

> must 'establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means')...." (Emphasis in original)

Petitioner is simply wrong about the evidence. The State of Alabama failed to adduce "historical facts capable of ready verification or impeachment" sufficient to warrant a conclusion that there was even a reasonable probability much less an absolute certainty that the incriminating evidence would have been obtained but for the violation of Respondent's rights.

The gun and clip could not have been properly seized from the apartment without a valid search warrant or valid consent. Here, there was not sufficient evidence to support a conclusion that a search warrant would have been issued and

that the gun and clip would have been located, identified, and recovered. Although Montgomery had worked for the University of Alabama Police Department for quite a while, his testimony that securing a search warrant would have been troublesome because he did not write that many affidavits indicates a critical lack of experience in the procedures for obtaining search warrants. Montgomery's testimony indicated that he had only been able to compose one paragraph containing his own biographical information. There was no evidence of what Montgomery contemplated including in the affidavit he was supposedly preparing for the purpose of securing a search warrant. Other than the various addresses given or listed for Fortier, there was no evidence as to what, if any, information

Montgomery possessed, prior to the illegal interrogation, that would lead to a belief that the gun might be located at any particular location. Indeed, there was no evidence presented to indicate that prior to the illegal interrogation Montgomery possessed any information specifically indicating that the gun was located at one of the various addresses given or listed for Fortier. There was no evidence of exactly what particular address Montgomery intended to be the subject of an affidavit and search warrant.[6] And, there was no evidence of exactly what forms -- correct forms or

---

[6] The place to be searched would have to have been particularly described. Fourth Amendment to the United States Constitution; Article I, Section 5, Alabama Constitution of 1901; Section 15-5-3, Code of Alabama. Thus, Respondent submits that the listing of alternative addresses or places would not have been legally sufficient.

incorrect forms -- Montgomery contemplated using in connection with seeking the issuance of a search warrant. Thus, the State of Alabama failed to prove by demonstrated historical facts that any affidavit and forms prepared by Montgomery would have been sufficient to support the issuance of a search warrant under the Fourth Amendment to the United States Constitution; Article I, Section 5 of the Alabama Constitution of 1901; and Section 15-5-3, Code of Alabama. Moreover, Montgomery did not testify that he would have gone on with the process of attempting to obtain a search warrant if Fortier had not given in and taken him to the apartment.[7] Nor was

---

[7] The Alabama Court of Criminal Appeals did not address the question of whether Fortier's "consent" to the

there any evidence of what the normal procedure or routine of the University of Alabama Police Department would have been

---

search was valid. At the time Fortier gave his consent, he was in custody. He had not previously cooperated with the police. In fact, after being advised of his Miranda rights, he responded that he did not want to make any statements without a lawyer present and signed an Explanation of Rights form and indicated thereon that he did not want to make a statement. Montgomery, who knew that Fortier's grandmother lived with his aunt and who correctly assumed that Fortier's grandmother was elderly, indicated to Fortier that if Fortier did not consent that he would search his aunt's house and in doing so greatly disturb the solicitude of the house. According to Montgomery's own testimony, this specter bothered Fortier. Fortier related that this did bother him and that he felt intimidated and for those reasons agreed to take Montgomery to the gun. Respondent submits that under these circumstances, his consent was not voluntary. Respondent submits that a conclusion can be drawn from the evidence that Montgomery did not have the intent of actually going through with the process of applying for a search warrant but rather used his "search warrant talk" with Fortier as a part of his interrogation effort.

in such situations. Additionally, the State of Alabama did not firmly establish that the gun and clip would have remained in their location until a search warrant could have been obtained. Thus, the State of Alabama simply failed to elicit historical facts sufficient to warrant a conclusion by a preponderance of the evidence that the incriminating evidence inevitably would have been obtained in a legal manner.

Finally, regardless of whether the evidence did or did not support a finding of inevitable discovery, this Court should not grant certiorari merely to review state appellate courts' interpretation of the facts in a particular case and application of the law to particular facts.

## CONCLUSION

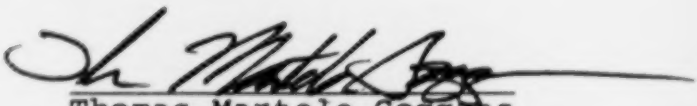
The petition for writ of certiorari should be denied.

Thomas Martele Goggans
Attorney for Respondent
Suite 205
770 South McDonough Street
Montgomery, AL 36104
(205)-834-2511

CERTIFICATE OF SERVICE

I, Thomas Martele Goggans, a member of the Bar of the Supreme Court of the United States, hereby certify that on this date, December 28th, 1987, I did serve the requisite number of copies of the foregoing upon counsel for Petitioner, by mailing the same, first class postage prepaid and addressed as follows:

Don Siegelman
James B. Prude
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130



Thomas Martele Goggans
Attorney for Respondent
Suite 205
770 South McDonough Street
Montgomery, AL 36104
(205)-834-2511